The learned senior federal counsel argued that the timbalan menteri was not obliged to issue the restriction order immediately after the order of arrest and detention under s 2(i). We do agree indeed we are not about to say that he was so obliged. He further argued that investigation had to be made and various statements had to be recorded and all these had to be effected in Sabah. If that had been the case all that was needed for the timbalan menteri to do was to say so in the affidavit. And if he had done that the onus would have rested on the person contending that the timbalan menteri had not so proceeded to satisfy the court that the timbalan menteri had not acted with convenient speed.

In consideration, it is our judgment that though the learned judicial commissioner had been erroneous in his reasons for the decision the decision itself was not an erroneous decision. For the reasons stated we dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Haji Sarip bin Hamid & Anor v Patco Malaysia Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-7 OF 1990
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
29 NOVEMBER 1990

Labour Law — Claim made to Industrial Court — Claimant director and general manager of company — Allegation that he was dismissed by company — Preliminary objection that he was not a workman — Ruling that claimant as general manager was a workman — High Court setting aside ruling of Industrial Court and dealing with merits of case — Industrial Relations Act 1967, s 20

In this case the first appellant had joined the respondent company as general manager and he was subsequently made a director. He sought the approval of the board of directors for the sale of his shares in the company. The board of directors approved the sale but subject to the conditions that he resigned from his post as general manager and also as a director of the company. The first appellant sent a letter resigning from his post of general manager and director effective three months from 30 May 1986. The board of directors decided to accept his resignation as general manager and director with immediate effect and to pay all his dues. The first appellant claimed that the dues had not been paid to him and he wrote to the company that unless his dues were paid or he was reinstated as general manager he would consider himself dismissed from the company. He later applied to the Industrial Court and a preliminary objection was raised that he was not a workman within the meaning of s 20(1) of the Industrial Relations Act 1967. The Industrial Court ruled that the first appellant as general manager came within the definition of 'workman' in the Act. An application for certiorari was made to the High Court and this application was allowed by the judge of the High Court who held that the ruling by the Industrial Court that the first appellant was dismissed was clearly perverse. The appellants appealed.

Held, allowing the appeal:

(1) The Industrial Court in this case had only decided on the preliminary objection and had not gone into the merits of the matter which had been adjourned for hearing.

(2) The learned judge had therefore decided on matters which have yet to be decided by the Industrial Court. He held that the first appellant had not been dismissed but had resigned voluntarily on 30 May 1986. In doing so he departed from the judicial review of the threshold jurisdiction of the Industrial Court into examining the substantive merits of the case (jurisdiction in the broad sense) on the matter of the dismissal claim pending before the Industrial Court.

[Bahasa Malaysia summary

Di dalam kes ini perayu pertama telah mula bekerja dengan syarikat responden sebagai pengurus am dan kemudiannya ia telah dilantik sebagai pengarah. Ia telah memohon kelulusan lembaga pengarah untuk menjual sahamnya di dalam syarikat itu. Lembaga pengarah telah meluluskan penjualan itu atas syarat ia meletakkan jawatannya sebagai pengurus am dan juga sebagai pengarah syarikat itu. Perayu pertama telah menghantar surat perletakan jawatannya sebagai pengurus am dan sebagai pengarah berkuatkuasa tiga bulan dari 30 Mei 1986. Lembaga pengarah telah memutuskan menerima perletakan jawatannya serta merta dan membayar kepadanya semua haknya. Perayu pertama mendakwa haknya itu tidak diberi kepadanya dan ia telah menulis kepada syarikat mengatakan jika haknya tidak dibayar atau ia diberi balik jawatannya sebagai pengurus am ia akan menganggap ia telah dipecat dari syarikat itu. Kemudiannya ia telah membuat permohonan kepada Mahkamah Perusahaan dan bantahan permulaan telah dibuat bahawa beliau bukan seorang 'pekerja' mengikut makna yang diberi oleh s 20(1) Akta Perhubungan Perusahaan 1967. Mahkamah Perusahaan telah memutuskan bahawa perayu pertama itu sebagai pengurus am termasuk di dalam takrif 'pekerja' di dalam Akta itu. Permohonan certiorari telah dibuat ke Mahkamah Tinggi dan permohonan itu telah dibenarkan oleh hakim Mahkamah Tinggi yang berpendapat bahawa keputusan Mahkamah Perusahaan bahawa perayu pertama telah dipecat adalah menyalahi undang-undang. Perayu-perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Mahkamah Perusahaan di dalam kes ini telah hanya memutuskan mengenai bantahan permulaan dan belum lagi membincangkan merit kes itu yang telah ditangguhkan untuk perbicaraan.

(2) Oleh kerana itu nampaknya hakim yang arif telah membuat keputusan atas perkara-perkara yang belum diputuskan oleh Mahkamah Perusahaan. Beliau berpendapat perayu pertama tidak dipecatkan akan tetapi telah meletakkan jawatannya dengan sukarela pada 30 Mei 1956. Apabila beliau membuat keputusan demikian, beliau telah menyimpang dari penyemakan kehakiman bidangkuasa permulaan Mahkamah Perusahaan kepada memeriksa merit yang benar-benar wujud di dalam kes itu (bidangkuasa di dalam makna yang luas) berkenaan soal pemecatan yang menanti keputusan di Mahkamah Perusahaan.]

Cases referred to

1 *Enesty Sdn Bhd* v *Transport Workers Union & Anor* [1986] 1 MLJ 18 (folld)
2 *Wong Chee Hong* v *Cathay Organization (M) Sdn Bhd* [1988] 1 MLJ 92 (refd)
3 *Inchcape Malaysia Holdings Bhd* v *RB Gray & Anor* [1985] 2 MLJ 297 (refd)

Legislation referred to

Industrial Relations Act 1967 s 20

Appeal from: Origination Motion No R8-32-77-88 (High Court, Kuala Lumpur)

B Lobo for the appellants.
Ambiga Sreenevasan for the respondent.

Cur Adv Vult

Lee Hun Hoe CJ (Borneo) (delivering the judgment of the court): We allowed the appeal and stated that we would give our reasons later. We do so now.

The appeal is concerned with a preliminary ruling of the Industrial Court in its Award No 122 of 1988. The facts have been set out in some detail by the learned judge. They may be stated shortly. Tuan Haji Sarip, the first appellant ('the claimant') joined Patco Malaysia Bhd, the respondent ('the company') in September 1980 as general manager. He was made a director on 23 June 1983 by the board of directors. He was also a shareholder of the company, having 16.32% of the equity of the company whose paid-up capital was $15m. In late April 1986 he contracted with Nihon Radiator Co Ltd Japan to sell 1.5 million of his shares in the company at $1.05 per share. He sought the approval of the board of directors for the said sale. By a resolution on 8 May 1986 the board of directors approved the sale but subject to certain conditions, one of which was that he resigned from his post as general manager and also as director of the company. By letter dated 16 May 1986 he conveyed to the company the conditions on which he would comply with the requirement formally to relinguish his positions. At a meeting on 30 May 1986 he requested the board of directors to issue a share certificate to the third party buyer of the said shares on an urgent basis. In return he wrote on the same day a letter resigning from his post as general manager and director effective three months from 30 May 1986. The board of directors decided to accept his resignation as general manager and director with immediate effect and to pay him all his dues. On 6 June 1986 the chairman of the board of directors wrote him two letters. One was to inform him that he ceased to be director on 30 May 1986. Another was to inform him that he ceased to be the general manager on 30 May 1986 and enclosing a cheque for $36,813 being payment of salaries, bonuses, allowances and so forth. On 19 June 1986 he wrote to the chairman of the board of directors that the dues promised to him had not been met. Unless he got a response about the dues or reinstatement to his former position of general manager by 25 June 1986 he would consider himself dismissed by the company.

The parties stated their positions clearly as indicated by the claimant's statement of the case (see Vol 2 of the appeal record, pp 30-33) and the company's amended statement of reply (see Vol 2 of the appeal record, pp 48-50).

By para 1 of the statement of reply the company stated that:

> This company will contend that the claimant is not a workman within the meaning of s 20(1) of the Industrial Relations Act 1967. Further and/or in the alternative, this company will state that the claimant who was also a director resigned from his post as general manager and director of the company and was not dismissed.

This brought about the preliminary issue before the Industrial Court and subsequent appeal to the High Court. At p 406 of Vol 2 of the appeal record the chairman of the Industrial Court set out the matter clearly when he said at the opening of his ruling:

> This company at the very outset of the hearing raised a preliminary objection that the claimant was not a workman within the meaning of s 20(1) of the Industrial Relations Act 1967.

In the course of his ruling he stated:

> I am satisfied from the evidence before me and the agreement — (co-2) — between the company and the claimant that the claimant was not the very brain and directing mind of the company. In the circumstances, I rule that the claimant as general manager of the company comes within the definition of 'workman' in the Industrial Relations Act 1967.

The learned judge disagreed with this ruling. At p 11 of his grounds of judgment he stated:

> The chairman of the Industrial Court in his award stated that he found that the claimant's resignation from directorship of the Board was effective immediately on 30 June 1986, and went to say:
>
> 'The claimant ceased to be a director on 30 May 1986. Then since the company did not comply with the requirements in the last paragraph of his letter — dated 19 June 1986 — of a positive response from the company about his dues or reinstatement to his former position of general manager of the company by 25 June 1986, therefore on the date he considered himself to be dismissed; he was not a director. This would take him out of the *Inchcape* case.'

He went on to say:

> But the date the workman considers himself to be 'dismissed' cannot be taken as the correct date of 'dismissal'. That date has to be determined by the Industrial Court on facts and evidence produced before it. Therefore, the learned chairman's conclusion by accepting the claimant's allegation that '25 June 1986 was the material date of dismissal without considering the facts disclosed in the letters of both parties and the minutes of the meeting on 30 May 1986, has been made because he (the chairman) had asked himself and answered the wrong question. It must be noted

that s 20(1) of the Act merely gives the right to a workman to make representation to the minister where a workman considers that he has been dismissed without just cause or excuse. That section does not confer on the workman the power to determine his date of dismissal.

At p 15 of his judgment the learned judge stated:

The learned chairman of Industrial Court has only considered the claimant's letter dated 19 June 1986 which in fact was written after the whole resignation/termination of employment exercise had been completed on 30 May 1986; and on 30 May 1986 the claimant was both an active director and a general manager of the company. As director of the company, he was part and parcel of the mind and will of the company, and he therefore cannot be a 'workman' — *Inchcape Malaysia Holdings Bhd* v *RB Gray & Anor* [1986] 2 MLJ 297.

He therefore held that the ruling by the Industrial Court that the claimant was dismissed on 25 June 1986 was clearly perverse and so devoid of plausible justification that no ordinary body of persons could have reached it.

It must be remembered that the question whether the claimant was dismissed on 30 May 1986 or 25 June 1986 has yet to be decided by the Industrial Court. So also the question whether the claimant had resigned voluntarily on 30 May 1986 has yet to be decided by the Industrial Court.

In *Enesty Sdn Bhd* v *Transport Workers Union & Anor*,[1] Mohamed Azmi SCJ, in delivering the judgment of this court, made the following observations at p 21:

Under the Industrial Relations Act 1967, a dispute on jurisdiction can occur at two stages in proceedings before the Industrial Court. The first is at the initial stage affecting the hearing of the reference or complaint itself when reference is made by the minister under ss 20(3), 26(1) or when a complaint is made under s 56(1); and second is at the final stage affecting the award ...

In our view the learned judge did not really distinguish the two stages. The Industrial Court has merely gone into the threshold jurisdiction (ie the initial stage) whether the claimant was a workman at the date when he considered himself dismissed. It has as yet to go into the merits.

The learned judge converted his review jurisdiction on the matter of certiorari in a preliminary issue as to whether the claimant was a workman or not as defined by the Industrial Relations Act 1967 into an appellate jurisdiction thereby going into the merits of the case.

Even if he can do so we think on the facts he went wrong. He came to the wrong conclusion.

The learned judge stated at p 12:

... It must be noted that s 20(1) of the Act merely gives the right to a workman to make representation to the minister where a workman considers that he has been dismissed without just cause or excuse. That section does not confer on the workman the power to determine his date of dismissal.

In *Wong Chee Hong* v *Cathay Organisation (M) Sdn Bhd*[2] the appellant held the position of personnel and industrial relations manager. In that capacity he had successfully negotiated a collective agreement with the trade union. The trouble started when he took steps to implement the award confirming the collective agreement. He was told that he would be transferred to manage a cinema theatre belonging to the respondent. He did not accept the transfer as he regarded it as a breach of contract entitling him to hold the respondent company liable for dismissing him without just cause or excuse. The dispute was referred to the Industrial Court which gave an award in favour of the appellant holding that he was constructively dismissed and awarded him compensation. The respondent company applied for certiorari to quash the award and this was granted in the High Court. The learned judge stated that the constructive dismissal was not within the ambit of s 20(1) of the Industrial Relations Act 1967 and therefore the Industrial Court had no jurisdiction.

In allowing the appeal this court held that the common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affecting the foundations of the contract or if the employer has evinced or shown an intention not to be bound by it any longer. It further held that there can be no doubt that the appellant in this case was lawfully doing his duty as the personnel and industrial relations manager of the respondent company when he negotiated a new collective agreement, represented the respondent company in the negotiations, obtaining an award and implementing it. The award for lawfully performing his duties was, however, not a promotion but a demotion. As he was driven out of his employment this was therefore a dismissal. The respondent failed to show that the dismissal was for a just cause or excuse. Finally, it was held that the Industrial Court in coming to the conclusion that the appellant was dismissed had not misdirected itself and the court only spoke of constructive dismissal in the context of the contract test. So long as the Industrial Court directed itself properly in law as to its jurisdiction, its finding and therefore its award must stand unassailable.

The learned judge's view would seem to be contrary to the decision in *Wong Chee Hong*'s case.[2] In the instant case the claimant ceased to be a director on the date of dismissal. The learned judge was wrong to say that the claimant must determine the date of dismissal. The learned judge did not appreciate the importance of the two stages and did not distinguish between the threshold and the broad jurisdiction. On the other hand, the Industrial Court was very cautious in not stepping over the line in deciding the preliminary issue.

The company said on the constructive dismissal point it was important to look into the documents, that is, the exchange of letters. It was conceded that at the end of the day the question whether there is constructive dismissal or not would be a decision on the merits. It was also conceded that there is a threshold jurisdiction and a broad jurisdiction. The company submitted that the learned judge was entitled to go into the date of constructive dismissal even at the threshold jurisdiction as the claimant put the issue to the court. He cannot now complain if the court dealt with it. It was contended that the learned judge was right to say that the date of constructive dismissal was on 30 May 1986.

The company relied on *Inchcape Malaysia Holdings Bhd* v *RB Gray & Anor*[3] for the proposition that if the claimant is a director he cannot be a workman. The claimant considered himself dismissed on 25 June 1986, by which date he was no more a director. One cannot ignore his resignation as general manager on 30 May 1986 but at the same time accept his resignation as a director. If he was forced to resign on 30 May 1986 that would be the date of the purported constructive dismissal. On the other hand the claimant contended that *Inchcape*'s case[3] should be distinguished on the facts and submitted that the finding of the Industrial Court that the claimant was a workman should not be disturbed. The Industrial Court considered the claimant to have ceased to be a director on 30 May 1986 and held that that would take him out of the *Inchcape* case[3].

The claimant pointed out that the Industrial Court kept to the point but the learned judge's approach was different. The Industrial Court merely went into the threshold jurisdiction to determine whether the claimant was a workman at the date when he considered himself dismissed.

The facts of each case must be scrutinized carefully to decide whether a person is a workman. At p 11 of his judgment the learned judge stated:

> The chairman of the Industrial Court went on to consider the functions and duties of the claimant as general manager of the company, and concluded that as a general manager, (and no longer a director wef 30 May 1986) the claimant was a 'workman' as defined in the Industrial Relations Act 1967. My finding is that if it is true that on the date the claimant was 'dismissed', he was not also a director of the company, the Industrial Court's award is correct.

Despite this finding the learned judge felt that the Industrial Court had made an error so he overruled the decision of the Industrial Court by going into the merits of the case.

The learned judge considered the position of director but did not touch on the position of general manager. The claimant contended that the two posts of general manager and director would seem to be merged as he always signed letters as director/general manager. The learned judge did not deal with this point.

The issue of whether or not the claimant was or was not dismissed or as to why he considered himself constructively dismissed was not decided on by the Industrial Court. This is very clear from the record of proceedings. Hence the chairman of the Industrial Court, after hearing the parties, concluded at p 415, Vol 2 of the appeal record by stating that:

> I disallow the preliminary objection made on behalf of the company and direct that the reference be fixed for hearing as to the merits of the matter.

We find that there is much force in the appellant's contention that the learned judge decided on matters which have yet to be decided by the Industrial Court. The learned judge held that the claimant had not been dismissed on 25 June 1986 or even on 30 May 1986. He further held that the claimant resigned voluntarily on 30 May 1986. In doing so he has departed from the judicial review of the threshold jurisdiction of the Industrial Court into examining the substantive merits of the case (jurisdiction in the broad sense) on the matter of the dismissal claim pending before the Industrial Court. As a result he had inadvertently stepped into the ambit of the broad jurisdiction. On the other hand, the Industrial Court was scrupulously careful of the borderline.

In the light of our decision we do not consider it necessary to deal with the other points raised on the appeal as they will in all probability be fully ventilated again at the reference.

Appeal allowed.

Solicitors: *Lobo & Associates; Skrine & Co.*

Reported by *Prof Ahmad Ibrahim*